

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1249

To be argued by
IRVING PERL

In The
United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

DONALD HEAD, a/k/a "MR. DON",

Defendant-Appellant.

*From a Judgment of Conviction of the United States District
Court, Southern District of New York.*

BRIEF FOR DEFENDANT-APPELLANT

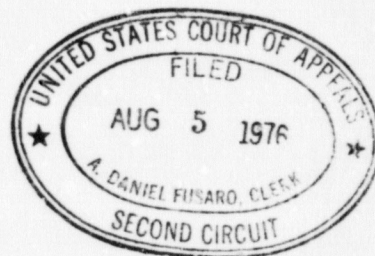
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-v-

DONALD HEAD, a/k/a "Mr. Don",

Defendant-Appellant.
-----X

STATEMENT

Defendant-appellant Donald Head was convicted of conspiracy in violation of Sections 812, 841(a)(1), 841(b)(1)(A), 952(a), 959, 960(a)(1), 960(a)(3) and 960(b)(1) of Title 21, United States Code, this being Count 1 of the indictment on a conspiracy count, and the defendant was further convicted of violations of Sections 812, 951 and 952(a) of Title 21, and Code Section 2 of Title 18 under Count 4 of the indictment and further under Count 5 of the indictment of violations of Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.

This was after trial before the Honorable Lloyd F. McMann and a jury. Sentencing was had on May 24 of 1976 at which time the defendant was sentenced to fifteen years incarceration and three years of special probation on each

one of the counts, said sentences to run concurrently.

ARGUMENT

POINT 1

THE COURT IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE INTRODUCTION INTO EVIDENCE OF A PARCEL MAILED TO THE DEFENDANT VIA REGISTERED MAIL BY A PERSON WITHIN THE CONTINENTAL UNITED STATES WAS IMPROPERLY SUPPRESSED.

Defendant-appellant Donald Head was immediately prior to his arrest a Staff Sergeant in the United States Armed Forces stationed at Don Muang Air Base in the City of Bangkok, country of Thailand. On March 9, 1976, Captain Roberts, defendant's Commanding Officer of the Air Base, received information from a Special Agent Kerr of the OSI and he thereupon concluded that the defendant Head matched the description, name and address supplied by Kerr.

Captain Roberts had learned on March 9th or March 10th that a registered package addressed to Head had arrived at the postal facility. Captain Roberts caused this package to be fluoroscoped and observed on the screen that it appeared to contain stacks of currency. Two assistants also viewed the fluoroscope screen and concurred with Captain Roberts' conclusion. Captain Roberts then contacted Special Agent Kerr.

Early in the morning of March 11, 1976 Special Agent Marr of the Drug Enforcement Agency learned that a complaint and arrest warrant against Head had been issued by the U.S. Magistrate for the Southern District of New York.

At approximately 11 AM on March 11, 1976 Captain Roberts caused a telephone call to be made to defendant Head's home to instruct Head to come to the Air Base in order to complete his processing for transfer back to the U.S. as his tour of duty in Thailand was soon to end. At about 3 o'clock that afternoon, Head, accompanied by his daughter, reported to Captain Roberts' office at the Air Base. Captain Roberts directed Head to complete his processing, to pick up his mail and then to return to the office. Head left the office, picked up his mail and returned to Captain Roberts' office almost immediately thereafter.

Head was then placed under arrest by two Air Force Security Police who took from Head a blue vinyl shoulder bag in the presence of Captain Roberts and Agents Kerr and Marr. Marr, while attempting to take out a bottle of milk for Head's daughter, saw the package which had been previously fluoroscoped. Shortly thereafter Head was taken from the Air Base to the OSI office in Bangkok with the package.

Shortly, again, a telephone call was then made by Special Agent Oak of the OSI to obtain authorization to open and search the package formally. At approximately 5 PM of March 11, 1971, Agent Kerr was informed that a search of the package had been authorized by Col. Howard F. O'Neal, Commanding Officer of the 635th Combat Support Group at Utapao Air Base Battalion. The package was then formally opened and the funds were found therein.

The law which governs the inspection of mail and the opening thereof has been very clearly enumerated by both Congress and the courts. Section 3623 of Title 39 of the U.S.C. sets forth with particularity under subdivision thereof "that the postal service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. (Emphasis ours).

" . . . No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law or by an officer or employee of the postal service for the sole purpose of determining an address to which the letter can be delivered, or pursuant to the authorization of the addressee."

Section 4057 of Title 39, U.S.C. provides with regard to opening of first class mail "only an employee opening

dead mail by authority of the Postmaster General, or a person holding a search warrant authorized by law, may open any letter or parcel of the first class which is in the custody of the Department."

It would appear, therefore, that the authority to inspect first class mail has been very carefully and clearly enunciated by Congress in the sections heretofore quoted.

The law is equally clear on the authority under which one may open first class mail, to wit, one may only open first class mail when it is pursuant to a warrant. The landmark case of Ex parte Jackson 96 US 727 at page 733 set forth the following principle which has never been overruled:

"Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guarantee of the right of people to be secure in their papers against unreasonable searches and seizures extend to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be searched, as is required when papers are subjected to searches in one's own household.

No law of Congress can place in the hands of officials connected with the postal

service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted to mailed matters of this kind must be in subordination to the great principle inspired in the fourth amendment of the Constitution."

This principle of law was further ratified and enumerated by the court in the United States v. Van Leeuwen, 397 US 249, 251 where the court said:

"It has long been held that the first class mail such as letters and sealed packages subject to letter postage -- as distinguished from newspapers, magazines, pamphlets and other printed matter -- is free from inspection by postal authorities, except in the manner provided by the fourth amendment. As stated in *ex parte Jackson* 96 U.S. 727, 733 decided in 1878:"

Wherein the court then went on to recite the portion which has been set forth immediately above.

In the Matter of United States v. Fisher, 377 F.Supp. 1298, decided in 1974, the court again validated the principle that without a warrant a postal inspector's opening a package was unlawful and that the search of the addressee's residence based on the prior inspection and seizure of cocaine in the package violated the defendant's fourth amendment rights and, therefore, the fruits of the search would then have to be suppressed.

There is no question but that Captain Roberts knew on March 9th or on March 10th when he was fluoroscoping the said package that he did not have a warrant in his possession and that a warrant is required to open first class mail and that this package, which was registered mail, was within the framework or ambit of first class mail (8a).

Again for the purposes of clarity, it must be shown that Section 3623, subdivision d of title 39 of the U.S. Code, specifically prohibits an inspection of any package or parcel which has been sent first class. At this point it must be realistically and reasonably conceded that the fluoroscoping of the package did constitute a search. To argue otherwise would be to belittle the dignity and wisdom of the court and the realities of the fluoroscoping of the package which did cause it to be inspected and reveal its contents. Indeed, the government even acknowledged that the fluoroscoping of the package constituted a search thereof (14a).

Factually, then, it cannot be argued that the package was inspected under any indicia of authority. Indeed there was no warrant nor was there any probable cause to give Captain Roberts the necessary authorization for inspecting the said parcel. The record clearly indicates that there was no warrant

authorizing the search of the particular parcel on March 9th or March 10th when the inspection thereof was made. Page 101 of the record indicates that Agent Maher first learned that a complaint had been issued by the Southern District Court's Magistrate on the morning of March 11, 1976 (13a), and that a warrant authorizing the arrest of the defendant Head had been issued by Commander O'Neal of the Utapao Air Base and that knowledge thereof was not acquired by Agents Marr or Kerr until some time at about 5:15 on March 11th, shortly after the defendant Head had been arrested (11a-12a).

The record is absolutely clear, therefore, that the parcel was considered and recognized as first class mail which required a warrant for its inspection (8a,10a) and that currency is not contraband pursuant to the Army Air Force Manual (9a).

In denying the defendant's motion to suppress, the court (89a-90a), stated that the Air Force Manual of January 28, 1973, particularly Section 14-3, authorizes examination of personal mail and that subsection c of Section 14-3 thereof provides fluoroscopying may be used for the examination of personal mail. However, it is respectfully submitted that this section is quoted entirely out of context. A close reading of Air Force Manual 182-1 of January 23, 1973 labeled "Chapter 14 -- Procedure for Customs Examination of Official and Personal Mail" (a)

provides as follows:

Section 14-1 labeled Custom Examination states:

"This chapter, implements procedures as prescribed by DOD Regulation 5030.49R for the customs examination by military postal personnel of official and personal mail addressed to civilian and official addressees in the customs territory of the United States or to another APO/FPO and mailed at a military post office outside such territory."

A reading of Chapter 14 in its entirety clearly shows that the provisions set forth in subparagraphs 1, 2, 3 of Chapter 14 only referred to mail which is sent by military personnel using the military postal facilities. There is absolutely no authority contained in any portion of Chapter 14 for giving the Army postal officials or the Military postal officials any authority to examine mail which is sent from the United States to a person in the military at a foreign base.

Further, Section 14-3, subdivision e thereof, specifically states:

"Mail which upon examination is found to contain contraband will be turned over to the appropriate investigative agency."

Subdivision f thereof states:

"Official mail being transmitted between military post offices and the United States under the indicia requires no customs

declarations forms or additional indorsements. Official matter mailed with postage affixed, as distinguished from the indicia, will not bear customs declaration forms but will be indorsed 'Contents for Official Use -- Exempt from Customs Requirements.'"

The military, therefore, recognizes that it cannot, in issuing manuals or procedures for the examination of mail, override Congress or the law of the United States.

It must be borne in mind that Chapter 14 relates solely to the military's authority to deal with 2nd, 3rd and 4th class mail which has been forwarded by a military man stationed overseas to a person within the continental United States. Nowhere does it authorize the inspection of incoming mail.

The court herein further compounded its error when it stated on page 650 that subdivision i of Section 14-3 provides in part:

"Commanders at all levels will establish continuing information programs to discourage and deter mailing of narcotics, drugs and other contraband and will review their procedures to insure that effective controls are implemented to prevent the use of personal mail for the mailing of all forms of contraband." (90a).

The court further went on to acknowledge that the package addressed to defendant Head had been sent from Washington, D.C. Clearly having been sent from Washington, D.C. this was not

merchandise mailed as personal mail from a military post office and was not subject to any kind of customs examination as it does not fall within the province of the section quoted by the court.

The court then goes on to discuss the ability or the right of customs to examine packages coming in to the Continental United States. There can be no quarrel with the right of customs to engage in such warrantless searches or seizures. However, the fact pattern here is completely different as there was no entry into the Continental United States and nowhere in the court's decision is there any authority set forth for the premise that Armed Forces personnel have the same rights with regard to their military bases as the customs officials have with regard to first class postal matter coming into the United States.

POINT II

THE CONVICTION HEREIN SHOULD BE REVERSED
BECAUSE THE EVIDENCE ADDUCED AT THE TRIAL
WAS INSUFFICIENT AND PREJUDICIAL AND BASED
ON THE UNCORROBORATED ADMISSIONS OF THE
CONCEPTIONS OF A CO-DEFENDANT.

The main witness for the government is an individual named Boonsek Phubasitkul, a man who was a codefendant and who was arrested on March 9th and who pleaded guilty shortly before the time of the trial herein and who entered into an agreement with the government with regard to his testimony, part of the agreement being that the defendant, Boonsek Phubasitkul, would be sentenced on May 27th by the Judge presiding at this trial, to wit, Judge Lloyd F. McMann (21a-23a).

It cannot be denied, therefore, that this witness was "an interested witness" in the sense that his further freedom or lack thereof depended on how he cooperated with the government in his attempt to convict the sole defendant before the bar at that time, to wit, defendant/appellant Donald Head.

Mr. Phubasitkul, during the course of his testimony, made very damaging, inflammatory and prejudicial statements with regard to units of heroin which were allegedly located in San Francisco and further stated that a colored guy was waiting for it out there. He also stated that the package in question was mailed by Mr. Don. Specific references will

be made hereinafter to these statements.

The sole purpose of the discussion at this point is to show the court that at no point was there any corroboration of any of the statements made by Mr. Phubasitkul with regard to the mailing, with regard to packages in San Francisco, and with regard to a colored guy waiting there for him. None of the statements made by Mr. Phubasitkul with regard to any of the above was in any manner, shape or form corroborated by an further testimony or independent evidence.

It is respectfully submitted that the introduction of this testimony by Mr. Phubasitkul and the allowing thereof was highly inflammatory and prejudicial to the defendant and that further, by allowing the said testimony, the court allowed the jury to feel that the involvement of Mr. Head was much greater than does appear from the record. There was at no point in the record any evidence of the fact that Mr. Don or Donald Head, the appellant herein, was in any way responsible for the packages which were allegedly in San Francisco. The packages were never produced at the time of the trial nor was there any evidence that Mr. Head was, in fact, the colored guy who was waiting for Mr. Phubasitkul in San Francisco.

Again, it is respectfully submitted that these statements

were allowed into evidence by the court erroneously and for the sole purpose of creating a prejudice with regard to the defendant and trying to show that the defendant herein was involved in a larger scope in terms of dealings and trafficking in narcotics than as is alleged in the indictments herein.

Again, the uncorroborated statements by Mr. Phubasitkul could do nothing but inflame and prejudice the jury so that they could not reach a fair and just verdict.

Mr. Phubasitkul, during the course of his testimony, constantly referred to his source of information as conversations with Manop Saiphantong or one of his other codefendants. The record is very clear that other than the uncorroborated statements by Mr. Phubasitkul there is nothing to substantiate what he said with regard to Mr. Head's activities. Again, the record herein is absolutely void of any proof of any direct mailing of the alleged package of heroin by Mr. Head. However, the record is replete with evidence of Mr. Phubasitkul's implicating Mr. Don, allegedly the appellant herein, Donald Head, on each and every instance possible and also the record, which will be gone into in further detail subsequently, is full of instances wherein the court prevented the counsel for the appellant from conducting cross examination so as to be

able to show that the witness, Boonsak Phubasitkul, was, in fact, not telling the truth.

An example of the court's allowing the introduction of prejudicial material with regard to this appellant is clearly contained during the following colloquy which took place, beginning where the court's question to Mr. Phubasitkul was, "Mr. Phubasitkul, at the time Boonterm gave you that piece of paper, did you have a conversation with him?" Answer: "Yes, Sir" and continuing until page 196 where the court stated, "It is a continuing conspiracy, I will allow it, I will let it stand."

The tenor of this testimony was to show that there were prior activities between a codefendant whose case had been severed, to wit, Bruce Wheaton, and one of the other members of the conspiracy. By allowing this testimony, the court very clearly set a frame of reference, to wit, a frame of drug dealing on a large scale with which it sought to provide a backdrop, not within the indictment, for the matter that was being tried at this time although there was no connection of any kind between the defendant, Donald Head, and the prior dealings of Mr. Wheaton and Mr. Boonterm set forth at any time in the record herein.

Evidence of such nature can only be highly prejudicial to the defendant and deprive him of his right to a fair trial. The court again committed prejudicial error when it allowed the witness to testify with regard to a conversation he had with Manop Saiphantong, an indicted co-conspirator who is not within the jurisdiction of the court. The tenor of the testimony was that he had been told by Manop Saiphantong that Wheaton was coming to Thailand for the purpose of buying merchandise from Boontem, also and indicated co-conspirator without the territorial jurisdiction of the United States, for the purpose of giving it to Mr. Don for mailing for him.

This evidence was allowed over the objection of defense counsel and clearly should have been stricken from the record. The statement by the witness with regard to Mr. Wheaton's purpose for coming to Thailand was pure hearsay with regard to the witness and again was so prejudicial and inflammatory that the defendant, by allowing this statement into evidence, was thereby deprived of a fair trial.

Further, for the record, it must be stated that nowhere in the allegations of overt actions is such an act set forth. The court further compounded this very serious prejudicial

error by allowing the witness, Phubasitkul, to testify that Mr. Manop Saiphantong told him that Bruce Wheaton had just left from Bangkok and he had two or three unit merchandise to give to Mr. Don to mail it.

This was done over the objection of counsel and again it is respectfully submitted that there was absolutely no corroboration of this and this was allowed solely by the court for the purpose of creating prejudice in the minds of the jury in attempting to depict the defendant/appellant, Donald Head, as a prime mover, when there is no proof or evidence of such activity (20a).

These errors were further perpetuated when the court allowed into evidence Exhibits 17 and 18, allegedly a letter and an envelope.

This came addressed to Bruce Wheaton wherein one of the defendants, Boonterm, makes reference to the \$20,000 debt from Mr. Wheaton to Boonterm. These items were allowed into evidence over the objection of counsel on the ground that there was no foundation laid for the authenticity of the items which the People were then offering in terms of who the author and writer of these items were, and also on the ground that it was not involved with the

defendant, Head, and totally without the scope of the indictment.

The objections were overruled and Exhibits 17 and 18 were allowed into evidence to the severe prejudice of the defendant, Donald Head (26a-28a).

Further prejudice to the defendant was committed when the court allowed agent Taylor, over the objection of defense counsel, to state that Don already had heroin in San Francisco and that the heroin was there waiting for arrival back in the United States and would be available for sale once the man arrived (24a-25a).

At no time during the course of the trial was this testimony ever corroborated by any independent evidence or any evidence whatsoever.

POINT III

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED
SINCE THE GOVERNMENT ADDUCED PROOF OF SEVERAL
-- NOT A SINGLE CONSPIRACY -- THEREBY
COMMITTING THE ERROR OF VARIANCE.

Since the indictment charged only one conspiracy, the judgment cannot stand in view of the adduction of proof concerning multiple conspiracy. When convictions have been obtained on the theory that defendants were members of a single conspiracy, though in fact the proof discloses multiple conspiracies, the error of variance has been committed.

Kotteakos v. The United States, 328 U.S. 750, 1946.

Assuming for the purposes of the brief herein that the court convicts the appellant, despite arguments set forth in Point II hereinabove that the testimony and evidence submitted therein was prejudicial, it should be clearly evident from the nature and tenor of the testimony set forth hereinabove in Point II that the reference therein was to a further and other conspiracy solely between the defendant, Boonterm Petkamnerd, Bruce Wheaton and the defendant-appellant herein, Donald Head. Nowhere in this other conspiracy is there any mention of the defendant, Boonsak Phuvasitkul. There is, therefore, during the course of this trial evidence of a second conspiracy not involving all of the defendants in

this matter.

Since the indictment charged only one conspiracy, the judgment cannot stand in view of the adduction of proof concerning multiple conspiracies and must be reversed.

POINT IV

THE JUDGMENT OF CONVICTION HEREIN SHOULD BE REVERSED BECAUSE THE COURT HAS DEMONSTRATED AN EXTREME PARTISANSHIP ON THE PART OF THE GOVERNMENT AND CONVEYED TO THE JURY A STRONG BELIEF OF THE DEFENDANT'S PROBABLE GUILT, SO STRONG THAT THE JURY COULD NOT FREELY PERFORM ITS OWN FUNCTION AND MAKE AN INDEPENDENT DETERMINATION.

In the Matter of the United States v. Persico, 305 F 2nd, 534, 540 the Court, quoting the Matter of the United States v. Ah Kee Eng, 241 Fed. 2nd 157, 161 62 A.L.R. 2d 159 (2 Cir. 1957) (Alternate holding), stated:

"While an appellate court should be loath to read too much into the cold black and white of a printed record, it cannot disregard numerous remarks from the bench of a nature to belittle and humiliate counsel in the eyes of the jury."

The holding in the Matter of the United States v. De Sisto, 289 F. 2nd 833, 834 (2 Cir. 1961) stated in essence that it was the function of the court to act as moderator between the parties. The court went on to say

"He must not, however, usurp the functions either of the jury or of the representatives of the parties and must take care not to give the jury an impression of partisanship on either side." (United States v. Curcio, supra, 279, F 2d at page 685; United States v. Brandt, 2 Cir. 196 F. 2d 653).

The court further went on to say:

"However, taking all this in conjunction with the long and vigorous examination of the defendant himself by the judge, and the repeated belittling by the judge of defendant's efforts to establish the time that Fine left the pier, we fear that in its zeal for arriving at the facts the court here conveyed to the jury too strong an impression of the court's belief in the defendant's probable guilt to permit the jury freely to perform its own function of independent determination of the facts. United States v. Brandt, supra, 196 F. 2d at page 656. We do not feel that it was possible to remove the impression by the instructions given in the charge." . . .

It is respectfully submitted that the situation herein evolved in exactly the situation described in the Matters of De Sisto and Persico so that it became impossible for the jury not to have drawn a conclusion with regard to the court's impression as to who was telling the truth and what the court's thoughts were with regard to defense counsel and his ability.

The following excerpts from the record should clearly demonstrate to this court the unabashed bias and prejudice which the Judge displayed toward defendant and defendant's

counsel during the course of the trial of this said matter. The first incident occurred when the court said, "We are taking a short recess. You study how to frame your questions. Frame it. I don't think it is framed so the witness can understand you."

(sic) The Court: "I am framing it, Your Honor, as clearly as I possibly can."

The Court: "Well, try harder."
(29a-30a).

This admonition from the court took place in front of the jury.

(Recess)

Shortly thereafter, while defense counsel was attempting to elicit a clear and unequivocal answer from the government's witness, the court, on its own motion, made an objection and made the comment, "Sustained, sustained. Save your arguments. There's time for that" (31 a).

Again, the court attempted to usurp the function of defense counsel in cross-examining the witness when defense counsel, after receiving many adverse answers, asked the witness a question: "Mr. Boonsak, very simply: was the merchandise in San Francisco or was it not?"

A. (through Interpreter) "As I have explained to you and I have answered you earlier -- Mr. Perl --

excuse me, Mr. Interpreter, I would move to strike the answer as unresponsive. I have asked for a yes or no answer. If the witness is incapable of answering, he should say so."

The Court: "Denied. Go ahead, answer it, Mr. Interpreter. As I have answered your question earlier, I was told by all this thing. I can't tell you the full details in yes or no. They told me that whenever the first deal is concluded I have to call bank to find out all the activities going on from time to time. I cannot answer you with this kind of question" (32a-33a).

Again, it would appear from the transcript that the court was determined that clear and unequivocal answers would not be obtained from the witness because the witness was constantly being allowed to hide behind an alleged language barrier which did not, in fact, exist and to hide behind the protection of the court which sustained objections to questions which called for a yes or no answer.

Almost immediately thereafter, the court then engaged in a totally injudicious manner of conduct and sought to humiliate and intimidate the defense counsel. The colloquy in question and which allegedly caused the court's remarks began as follows:

"Q. Mr. Boonsak, further down, do you remember saying to Mr. Taylor, 'Oh, he did not know, nothing. I just, I just pay him two thousand five hundred dollars for to mail that parcel, that's all.

"Taylor: You pay him two thousand five-hundred dollars?

Whom were you talking about, Mr. Boonsak? A. [Through interpreter:] According to what I have testified earlier, that every time Manop told me that every time they asked Don to mail for them, they asked for 25,000 baht -- \$2,500, for each packet mailed.

Q. Mr. Boonsak said --

MR. VIRELLA: Objection. He has not finished his answer, your Honor.

THE COURT: Yes, let him finish. Don't be impatient.

MR. PERL: Sorry. A. [Through interpreter:] But it was this time that we talk about the mailing of the 700 grams that he, instead of taking the money, he wanted one unit.

And being the reason that Don has choose to get one unit of merchandise, and also want to buy other units. And according to my additional conversation with Manop on the phone, I understand that he was not paid for the units that he is supposed to be paid to him. That is why Manop told me that he don't want to mail any more.

As you can see on my conversation and which was on the tape --

MR. PERL: Your Honor, may I ask that the answer be stricken.

THE COURT: No, I will not strike it. You ask wide open questions.

MR. PERL: Your Honor, my question was -- may I rephrase the question. I asked --

THE COURT: Proceed with your answer. Go ahead.

MR. PERL: I asked him who the guy was. That was my only question.

THE COURT: I heard you. Proceed with the answer.

MR. PERL: May we have the question read back?

THE COURT: Please, shut up.

MR. PERL: Your Honor, I respect the Court, I don't mean to be disrespectful.

THE COURT: Well, you are being singularly disrespectful.

MR. PERL: I don't mean to.

THE COURT: The jury will please step out. We will take a short recess.

(The jury left the courtroom).

THE COURT: I won't tolerate this, Mr. Perl. When I rule, that's it. If you don't like what I say or the way I rule, there is a Court above me that is quick to reverse if I am wrong. I will not turn this into a bar room

debate with you or anyone else. And I fine you \$200 for contempt of Court.

Bring in the jury.

MR. PERL: May I for the record say I resent the Court telling me to shut up. I think I have a right to answer when I am treated in that way.

THE COURT: You have no right to give me all the guff. You provoked it.

MR. PERL: Your Honor, I did not give you an guff.

THE COURT: You provoked it. I fine you \$200. And if you don't shut up now, I am going to fine you \$500 more. Who do you think you are? Boring the jury to death, going on here interminably. You get down to business and finish this case.

All right, bring the jury out. And don't do anything like that again or you will spend the night in jail" (a).

[Jury present.]

* * *

As can be seen from the questions, when defense counsel moved to strike the answer, and it is submitted it was perfectly within bounds as the answer was totally unresponsive and not answering the question of "whom were you talking about, Mr. Boonsak?", the court was under the impression, apparently willfully or inadvertently, that the question was other than "who was the guy?"

In an attempt to ascertain what the question was so that the answer could properly be evaluated, I asked that the question be read back. As can be seen from the colloquy on page 511, the court said, according to the record, "please shut up." This in front of the jury. It must be stated at this point that the record is totally inadequate to reflect the manner in which the court said "please shut up." The court at the time that it said that was standing up behind its chair and it did not say it in dulcet or moderate tones. The court literally bellowed the words, "please shut up" in a manner which was an attempt to humiliate defense counsel.

Defense counsel said, "Your Honor, I respect the court. I do not mean to be disrespectful." The court thereupon accused me of being singularly disrespectful and, as can be seen from the record, the court was then recessed and the court accused defense counsel of giving it all kinds of guff and thereupon fined defense counsel \$200. In response to the court's statement, defense counsel said, "I resent the court telling me to shut up. I think I have a right to answer when I am treated that way." The court thereupon said, "You had no right to give me that guff.

You provoked it" and defense counsel stated in all candor "Your Honor, I did not give you any guff" and the court insisted that it was provoked and that the fine was \$200. and that, if defense counsel did not stop arguing with the court, the fine would be \$500 more.

The court thereupon accused defense counsel of boring the jury to death and going on interminably.

It is respectfully submitted that the record will clearly indicate that at no time was defense counsel giving the court any guff. Defense counsel was merely trying to ascertain what the question had been in regard to its motion to strike. The court, in its annoyance and impatience and in an attempt to humiliate defense counsel, fined counsel \$200 and threatened an additional fine of \$500 if counsel did not adhere to the mandate of the court.

It is respectfully submitted that the court's actions were entirely unwarranted and uncalled for.

After the jury rendered its verdict and was discharged, the court continued to press defense counsel with regard to the alleged contempt (46a-47a).

The record clearly conveys the feeling of the court and the feelings of the defense counsel with regard to the contempt citation.

Subsequently, and thereafter, on May 24, 1976, the citation was withdrawn by the court when it said:

"We have the matter of a pending contempt of defense counsel. After thinking it over, the court has decided it would take more out of the court than it would do good to the defense counsel and I haven't got time to be writing certificates of contempt so we will go no further with that."

Mr. Perl: "Thank you, your Honor"
(97a).

The yelling or bellowing of "Please shut up" to defense counsel in front of the jury must have clearly made an impression upon the jury as to what the court's feelings were with regard not only to the defense which was trying to be asserted but also with regard to the feelings the court had toward defense counsel. Clearly, this was a highly prejudicial and unwarranted act on the part of the court (37a-40a).

The proceedings were rife with actions on the part of the court whereby they allowed the witness to avoid answering the question of "who was the person who was waiting for him in San Francisco." Defense counsel was of the opinion that a definite answer to this would be very beneficial to the defendant because it would clearly show that it could not be the defendant whom the witness constantly reiterated was the person in San Francisco because the defendant at this

time was admittedly at his base at Don Muang Airport in Bangkok. Apart from preventing defense counsel from trying to crystallize this particular point, the court made certain comments which again displayed its attitude toward defense counsel in a very biased and prejudiced manner.

The court stated:

"Mr. HEAD - or Mr. PERL - I am giving you five minutes more to bring your cross examination to a close.

"Mr. PERL: Your Honor, I respectfully . . .

"THE COURT: Five more minutes, Mr. Perl -

"MR. PERL: I am sorry, sir, I cannot finish it in five minutes.

"THE COURT: Well, you're going to finish in five minutes because I am cutting you off if you do not" (38a).

By making these gratuitous comments in front of the jury, the court very clearly and unequivocally conveyed to the jury its impression that the defense counsel was asking very frivolous and meaningless questions. The court furthered that impression very shortly thereafter when in response to an objection by the government attorney the court answered "sustained". "Ad nauseum. Asked and Answered" (40a)

Again, the comment "ad nauseum" was a gratuitous comment totally uncalled for and unnecessary on the part of the court. This gratuity could serve no purpose other than to convey the court's disfavor and impatience with defense counsel and the answers it was trying to elicit by its form of questioning.

Immediately before that, the court tried to give the jury the impression that defense counsel was some sort of misfit, and totally ignorant of courtroom amenities. The court stated "Please don't lean on the jury rail. We don't do that here" (39a).

In making that statement to the defense counsel in front of the jury, the court again sought to imply and convey to the jury that defense counsel was not versed in the proper manner and conduct in which to try a case in the Federal Court.

This statement again was totally unwarranted and uncalled for on the part of the court and it was made solely for purposes of demeaning and humiliating defense counsel in front of the jury.

Throughout the course of the trial, the government witness, Boonsak Phuvasitkul, sought to convey the impression to the jury that he had a language problem. In an effort to

ascertain the truth or falsity of this, defense counsel embarked on a series of questions during cross examination which showed that the witness, Boonsak Phuvasitkul, had attended classes for a period of a few months for 5 (five) days a week for approximately 2-1/2 to 3 hours a day in New York City.

When the questioning became critical, to wit, when defense counsel asked the witness "Sir, were these classes conducted in English", the government attorney objected and the court sustained the objection. Defense counsel then asked in what language were these classes conducted. The court, on its own motion, sustained an objection stating that it is the same question in another form. "It is entirely immaterial". Defense counsel then stated to the court that, since the witness states he has a language problem, defense counsel would like to ascertain what was going on at the time. The court thereupon on its own motion took judicial notice that the witness had a language problem and ordered defense counsel to proceed.

In an effort to explore whether or not the witness did or did not have a language problem, defense counsel asked the witness, "Did you have an interpreter with you when you attended classes?", to which the government attorney objected

and the court sustained the objection. The question was then put to the witness, "Did anyone help you?" and the court sustained an objection on its own motion and directed defense counsel to turn to another subject (41a-43a).

It is submitted that the court in not allowing defense counsel to thoroughly inquire as to what conditions the government witness attended school in 1974 was clearly erroneous in that the court did not allow a true inquiry into whether or not the witness did have a language problem and that the court on its own motion threw its protective mantle over the witness by taking a judicial notice of an alleged language problem and directing defense counsel to proceed to another subject.

As was stated by the court in United States v. Guglielmini, 384 F 2d 602, 604, (2 Cir. 1967):

"The record contains numerous instances of repartee between the judge and defense counsel. Most of this was wholly unnecessary and much of it could only have served to demean counsel and case an unfavorable light on the defense."

It is respectfully submitted to the court that this is exactly what took place during the trial of the instant matter. Had there been only one or two instances of colloquys representing disagreement between defense counsel and the court, they

would have been of no import and would have been merely an error. However, as said in the Guglielmini matter supra at at page 605,

"While the trial judge may, and indeed should, take an active part in the trial where necessary to clarify evidence and assist the jury, the persistent questioning the trial judge conducted in this case, together with his comments to defense counsel, conveyed to the jury far too strong an impression of his belief in the defendants' guilt. See, e.g., United States v. Persico, 305 F. 2d 534 (2 Cir. 1962); United States v. DeSisto, 289 F. 2d 833 (2 Cir. 1961)."

It is respectfully submitted that that is exactly what took place in this matter.

POINT V

THE JUDGMENT OF CONVICTION HEREIN MUST BE REVERSED BECAUSE THE ASSISTANT UNITED STATES ATTORNEY MADE IMPROPER ARGUMENT DURING HIS SUMMATION.

During the summations of the jury, the Assistant United States Attorney made the following comment:

"You also heard testimony at the time Sergeant Head was arrested at the Air Base that he had a little package with him from Washington, D.C., Government Exhibit 15, and in that package, ladies and gentlemen, we submit to you that you can infer that this is the reason for sending packages like that to New York. That this came from Washington, \$26,000. Postal inspectors do not make that kind

of money today but we submit to you for people who are afflicted in drugs it don't mean a day's work' (44a-45a).

The United States Attorney, in submitting to the jury that the money received was in payment for narcotics which had been previously mailed by the defendant, Donald Head, was totally out of order in that there is absolutely not one statement of fact in the record to justify any such statement on the part of the United States Attorney. It is submitted that the United States Attorney was, in effect, testifying and seeking to sway the jury in a highly prejudicial manner without any foundation in fact in the record.

CONCLUSION

It is respectfully submitted that for the reasons stated hereinabove, the judgment of conviction should be set aside and a new trial ordered on behalf of defendant-appellant Donald Head.

Respectfully submitted,

Irving Perl
Attorney for Defendant-Appellant,
Donald Head

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

DONALD HEAD, a/k/a "MR. DON",
Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, James A. Steele, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 West 146th Street, New York, New York
That on the 5th day of August 1976 at One St. Andrews Plaza, New York, New York

deponent served the annexed *Brin* upon
Robert B. Fiske Jr.

the Attorney in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 5th
day of August 19 76

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977